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DATO' CAPT MOHD NAJIB ABDULLAH v. NATARJAYA SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: 21NCVC-9-02-2014]
B 23 OCTOBER 2015

LAND LAW: *Indefeasibility of title and interests – Fraud – Property purchased from developer – Developer sold property to third party for second time after issuance of strata titles – Third party registered as proprietor – Lodgement of caveat on* C *property – Subsequent sale by third party – Plaintiff never registered as proprietor of property – Whether plaintiff beneficial owner of property – Whether developer held property under trust for plaintiff – Applicability of s. 340 of National Land Code – Whether only former registered proprietor could challenge title of subsequent registered owner – Whether third party was bona fide purchaser*

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In 1989, the plaintiff purchased a studio apartment ('the property') from the developer, Natarjaya Sdn Bhd ('the first defendant'). The second and third defendants were directors of the first defendant. To finance the purchase, the plaintiff obtained a loan from BBMB Kewangan Berhad. In 2007, CIMB Bank Berhad, the successor entity of BBMB Kewangan Berhad, executed a E deed of receipt and reassignment in favour of the plaintiff. The loan amount had been fully disbursed (as a corollary the purchase price of the apartment had been fully paid by the plaintiff) and the loan was eventually re-paid by the plaintiff to the bank. From a search of the strata roll, the plaintiff discovered that the property had been registered in the name of one Chan F Kwai Foong ('the fourth defendant'). It appeared that after the strata titles for the property had been issued to the first defendant, it then sold the property for the second time to the fourth defendant for the amount of RM45,000, who was then registered as its proprietor. After discovering that the property was registered in the name of the fourth defendant, the plaintiff lodged a G caveat against the property, and informed the fourth defendant on 6 June 2012 of his claim. Subsequently on 11 September 2013, the fourth defendant entered into an agreement with one Kenneth Tan ('the fifth defendant'), to sell the property to the latter for the amount of RM95,000, subject to the condition that the fifth defendant procure the removal of the plaintiff's caveat. The fifth defendant paid RM45,000 to the fourth defendant as part H of the purchase price. The plaintiff then commenced the present action for, among others, a declaration that he was the rightful beneficial owner of the property and to compel the Registrar of Titles ('the sixth defendant'), to effect registration in his favour. The first to third defendants had not entered any appearance to defend the plaintiff's claim of fraud against them. The fourth I defendant did not attend court to personally testify, but had, by way of a

power of attorney, authorised one Sea Nyit Yong ('DW2') to testify on her behalf. The issues that arose for the court's determination were, *inter alia*, (i) whether the plaintiff, who had never been registered as proprietor of the property, was entitled to invoke s. 340 of the National Land Code ('NLC'); or (ii) whether it was only open to a former registered proprietor to challenge the title of a subsequent registered owner under this provision of the law.

Held (allowing plaintiff's claim against first to fourth defendants; dismissing plaintiff's claim against fifth defendant)

(1) The first to third defendants had not entered any appearance to defend themselves against the plaintiff's claim. Accordingly, not only should a finding of fraud be taken as having been proven against the first to third defendants, but also the finding would be binding on the other defendants in the action. On a plain reading of the plaintiff's claim, sufficient particulars of fraud have been pleaded that the argument of the fourth defendant could not be sustained to defeat the plaintiff's allegation of fraud on a mere point of pleading. (paras 12 & 22)

(2) Section 340(2) does not specify the identity of the person who may defeat the title of a registered holder. The plaintiff, having paid the purchase price, became the beneficial owner of the property, with the vendor holding the legal title to the property on a bare trust for the plaintiff. There is nothing in s. 340 of the NLC that proscribes the beneficial owner to avail himself of the protection of the provision. The existence of a bare trust should not have the effect of defeating the title of a registered proprietor in a system of title by registration. The only way in which the title of a registered proprietor may be challenged is under the NLC itself. (paras 22 & 25)

(3) Having paid the purchase price for the property, the plaintiff became the beneficial owner. The first defendant held the property as bare trustee for the plaintiff. When the first defendant entered into an agreement to sell the property a second time to the fourth defendant, it committed a fraud and its title became defeasible on account of such fraud. It does not matter that no conveyance had yet taken place, as s. 340(2)(a) places no requirement that there must be a registration for the characterisation of the title of the proprietor to change. (para 36)

(4) When the property was transferred to the fourth defendant, her title was defeasible by virtue of s. 340(3)(a), due to the vitiating circumstance of the fraud by the first to third defendants. It then became incumbent on the fourth defendant to show that it was a purchaser in good faith and for valuable consideration. If it is determined that the fourth defendant was, in purchasing the property, complicit in the fraud committed by the first to third defendants, then her title would be defeasible pursuant to s. 340(2)(a). (para 37)

(5) A confirmation from the first defendant dated 10 September 2008 stating, *inter alia*, that there was no encumbrance over the property and the copy of the strata title showing that the first defendant was the registered proprietor of the property was tendered through DW2 to establish that the fourth defendant was a *bona fide* purchaser for valuable consideration. The absence of personal testimony of the fourth defendant will not necessarily be fatal to the fourth defendant's case that she was a *bona fide* purchaser, and that it may be possible for documentary evidence to be used to establish *bona fides*. However, the evidence will have to be assessed as a whole in determining the particular question of fact. (paras 51 & 52)

(6) As the fourth defendant did not testify in person, there was no explanation as to why the purchase price paid by the fourth defendant was lower than the original purchase price paid by the plaintiff and much lower than the subsequent sale price to the fifth defendant. Therefore, the two documents referred to by the fourth defendant do not, in the light of the contrary evidence and in the absence of the fourth defendant's personal testimony, establish that she was a purchaser in good faith and for valuable consideration. The fifth defendant was never registered as proprietor of the property, and therefore no issue arose as to his title. (paras 53, 55 & 56)

Case(s) referred to:

Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC ***(dist)***

Howard v. Miller [1915] AC 318 ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(foll)***

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(foll)***

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107 HC ***(refd)***

S Lourdenadin v. M Ratnavale Nee Annalakshmi Vattivelu & Anor [1986] 1 CLJ 228; [1986] CLJ (Rep) 481 HC ***(refd)***

Samuel Naik Siang Ting & Ors v. Public Bank Bhd [2015] 6 CLJ 914 CA ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(dist)***

Legislation referred to:

National Land Code, ss. 340(1), (2)(a), (b), (c), (3)(a), 417

Other source(s) referred to:

Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia*, 3rd edn, p 200

For the plaintiff - Harjinder Singh Sandhu; M/s Akberdin & Co
For the 4th defendant - Bani Prakash; M/s Bani Prakash & Co
For the 5th defendant - CB Liang; M/s Nga Hock Cheh & Co
For the 6th defendant - Shahroni Sanusi; SFC

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] This case involved a real property dispute between a purchaser of an apartment unit, the developer of the apartment block and its directors (none of whom entered appearance), two subsequent purchasers of the apartment (the first of whom became registered as proprietor), and the Pendaftar Hakmilik Tanah Wilayah Persekutuan Kuala Lumpur, the sixth defendant.

[2] One of the key legal issues arising in this case was whether a purchaser of real property who never became registered as a proprietor is entitled to invoke s. 340 of the National Land Code (NLC), or whether only persons who were previously registered as proprietors may do so.

Salient Facts

[3] In 1989, the plaintiff, Dato' Capt Mohd Najib bin Abdullah, purchased a studio apartment in Menara Seputeh from the developer, Natarjaya Sdn Bhd (Natarjaya), which is the first defendant in this action. The second and third defendants are directors of Natarjaya.

[4] To finance the purchase, the plaintiff obtained a loan from BBMB Kewangan Berhad. In 2007, CIMB Bank Berhad, the successor entity of BBMB Kewangan Berhad, executed a deed of receipt and reassignment in favour of the plaintiff. I am satisfied that the loan amount had been fully disbursed (as a corollary the purchase price of the apartment had been fully paid by the plaintiff) and that the loan was eventually repaid by the plaintiff to the bank, based on the evidence adduced at trial, in particular the existence of the deed of receipt and reassignment and the testimony of the officer of CIMB Bank Berhad (PW2). Counsel for the fourth defendant placed great store on the fact that the plaintiff had not tendered any evidence that showed that Natarjaya as the developer had acknowledged payment of the purchase price. In my judgment, the evidence of such a confirmation from the developer was not essential to the plaintiff's case, as there was other independent evidence from the financier of the plaintiff that proves, on a balance of probabilities, that the plaintiff had fully paid the purchase price of the property to Natarjaya.

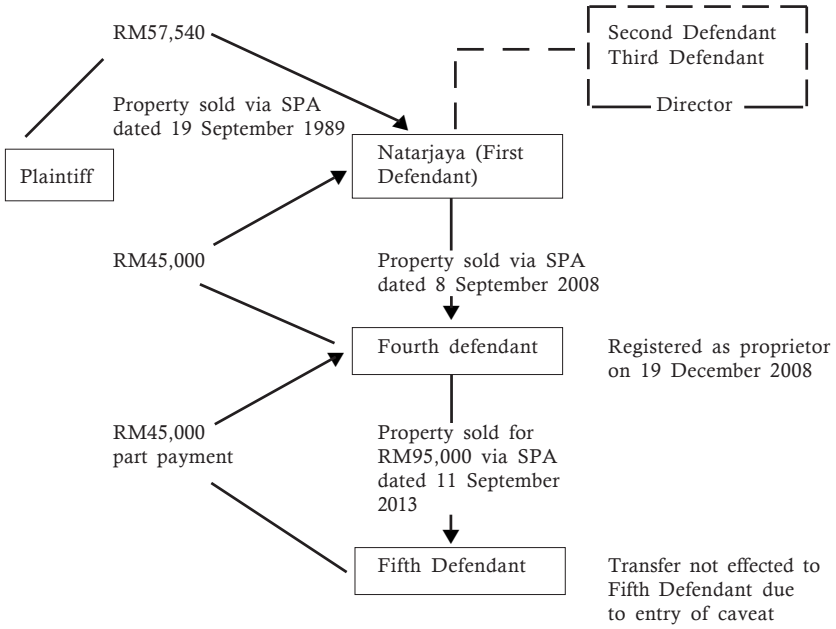
[5] The plaintiff for many years resided in South Korea, and returned in 2012. He visited the apartment and discovered that the locks had been changed. He also subsequently discovered from a search of the strata roll that the property in question had been registered in the name of Chan Kwai Foong, the fourth defendant.

[6] It appeared that after the strata titles for the units in Menara Seputeh had been issued to Natarjaya, it then sold the apartment in question for the second time to the fourth defendant for the amount of RM45,000 who was then registered as its proprietor. The sale and purchase agreement between Natarjaya as vendor and the fourth defendant as purchaser of the apartment was dated 8 September 2008.

[7] After discovering that the property was registered in the name of the fourth defendant, the plaintiff lodged a caveat against the property, and informed the fourth defendant on 6 June 2012 of his claim. Subsequently on 11 September 2013, the fourth defendant entered into an agreement with Kenneth Tan, the fifth defendant, to sell the apartment to the latter for the amount of RM95,000 subject to the condition that the fifth defendant was to procure the removal of the plaintiff's caveat. The fifth defendant has paid RM45,000 to the fourth defendant as part of the purchase price.

[8] The plaintiff commenced this action for, among others, a declaration that he is the rightful beneficial owner of the property and to compel the Registrar of Titles, the sixth defendant, to effect registration in his favour.

[9] The relevant transactions affecting this case are summarised in the following diagram:


RM57,540
Second Defendant
Third Defendant
Director
Property sold via SPA dated 19 September 1989
Plaintiff
Natarjaya (First Defendant)
RM45,000
Property sold via SPA dated 8 September 2008
Fourth defendant
Registered as proprietor on 19 December 2008
RM45,000 part payment
Property sold for RM95,000 via SPA dated 11 September 2013
Fifth Defendant
Transfer not effected to Fifth Defendant due to entry of caveat

[10] At trial, the fourth defendant did not attend court to personally testify, but had by way of a power of attorney authorised one Sea Nyit Yong (DW2) to testify on her behalf.

Issues

[11] Having heard submissions of counsel, I have distilled and reformulated the key issues in this case into the following:

(a) counsel for the fourth defendant raised the preliminary point that the particulars of fraud were not sufficiently pleaded as against Natarjaya and the fourth defendant and that accordingly the plaintiff's case must fail on a point of pleading;

(b) whether the plaintiff, who had never been registered as proprietor of the property, was entitled to invoke s. 340 of the NLC, or whether it was only open to a former registered proprietor to challenge the title of a subsequent registered owner under this provision of law;

(c) whether the title of the fourth defendant was defeasible under s. 340 of the NLC, and in this connection:

(i) whether the plaintiff has proven fraud as against the fourth defendant so as to render her title defeasible under s. 340(2)(a) of the NLC;

(ii) whether it was open to the fourth defendant to argue that she is a purchaser in good faith and for valuable consideration, and was capable of obtaining indefeasible title pursuant to s. 340(3) of the NLC. It will be remembered that the fourth defendant was not a subsequent purchaser but was an immediate purchaser, having purchased the property directly from the developer. In answering this question, it will be necessary to examine the decision of the Federal Court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768 and in particular the guidance given to trial judges by Jeffrey Tan FCJ;

(iii) if the answer to the preceding issue is in the affirmative, whether the fourth defendant was, as a matter of evidence and fact, a *bona fide* purchaser for valuable consideration, bearing in mind that she bore the burden of proving her *bona fides*, and that she had elected not to give evidence in person but had executed a power of attorney to authorise evidence to be given on her behalf.

[12] In as far as the plaintiff's claim of fraud against the Natarjaya and its directors is concerned, they had not entered any appearance to defend themselves against such claim. Accordingly, based on the decision of the Federal Court in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* not only should a finding of fraud be taken as having been proven against the first to third defendants, but also this finding would be binding on the other

defendants in the action. (See paras. 7 to 11 of the judgment in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* at pp. 995 to 997 (CLJ), at pp. 773 to 775 (MLJ))

Summary Of Findings And Decision

[13] The following summarises the findings of this court:

(a) as mentioned above, the plaintiff's claim of fraud against the first to third defendants has been made out on account of their failure to enter a defence;

(b) sufficient particulars of fraud have been pleaded, and therefore the plaintiff's claim does not fail on a mere point of pleading;

(c) section 340 of the NLC is not merely available to invoked by a former registered proprietor, but may also be invoked by a beneficial owner, based on a reading of its plain words and on the authority of the Federal Court decision in *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224 (a case dealing with the predecessor provision to s. 340 of the NLC in the FMS Land Code) and the more recent Court of Appeal decision in *Samuel Naik Siang Ting & Ors v. Public Bank Bhd* [2015] 6 CLJ 914;

(d) the plaintiff has failed to prove that the fourth defendant was a party or privy to the fraud committed by the first to third defendants. Accordingly, the fourth defendant's title is not defeasible under s. 340(2)(a) of the NLC;

(e) based on the authority of the case of *Ong Chat Pang & Anor*, an immediate purchaser who was not implicated in any fraud can obtain an indefeasible title if he can show that he was a purchaser in good faith for valuable consideration within the meaning of the proviso to s. 340(3) of the NLC;

(f) on the facts, the fourth defendant was not able to satisfy this court that she was a purchaser in good faith and for valuable consideration. As a consequence, the title of the fourth defendant was defeasible at the instance of the plaintiff; and

(g) no issue arose as regards to the title of the fifth defendant as he was never registered as proprietor of the subject property. The plaintiff has not made out his case of fraud against the fifth defendant. As such, the plaintiff's claim against the fifth defendant is dismissed.

[14] The analyses underlying these findings are set out in para. 16 *et seq., post.*

[15] As the consequence of these findings, there is judgment as follows:

(a) in exercise of the powers under s. 417 of the NLC, the sixth defendant is directed to effect the transfer of the property held under Suratan Hakmilik Strata Geran 11459/M1/3/7 Lot No 375, Seksyen 99, No. Petak 7, No. Tingkat 3, No. Bangunan M1, Bandar Kuala Lumpur Daerah Wilayah Persekutuan to the plaintiff and to record the plaintiff as the registered proprietor of such property;

(b) the first to third defendants are liable to the plaintiff for:

(i) general and exemplary damages to be assessed by a Registrar of this court;

(ii) pre-judgment interest on the sum of damages assessed pursuant to sub-para. (i) at a rate of 5% per annum from 8 September 2008 until 23 October 2015; and

(iii) post-judgment interest on the sum of:

(1) damages assessed pursuant to sub-para (i); and

(2) pre-judgment interest in sub-para (ii),

at a rate of 5% per annum from 24 October 2015 until full realisation;

(c) each of the first to fourth defendants are to pay costs of RM30,000 to the plaintiff;

(d) there is no order as to costs in respect of the fifth and sixth defendants.

Analysis

Whether Particulars of Fraud Sufficiently Pleaded

[16] Counsel for the fourth defendant argued that the particulars of the allegation of fraud as against the defendants had not been sufficiently pleaded and that the statement of claim, instead of pleading material facts, contained legal conclusions or legal results and was therefore deficient for this reason.

[17] In reply, Counsel for the plaintiff cited the case of *S Lourdenadin v. M Ratnavale Nee Annalakshmi Vattivelu & Anor* [1986] 1 CLJ 228; [1986] CLJ (Rep) 481; [1984] 1 MLJ 297 where the particulars of fraud had been worded using a similar formulation of words and which was not held to be defective. Although the defendants' appeal in this case was subsequently allowed in part by the Supreme Court in *Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168; [1988] 2 MLJ 371 and *Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168, this did not affect the particular point under consideration here.

[18] In the course of oral submissions, I invited counsel for the fourth defendant to suggest how he would have drafted the claim to avoid the pitfall into which he claimed counsel for the plaintiff had fallen, but rather tellingly in my view he assiduously declined my invitation.

[19] Having examined paras. 20, 21 and 22 of the statement of claim, I am of the view that, on a plain reading of the plaintiff's claim, sufficient particulars of fraud have been pleaded, and that the argument of learned counsel for the fourth defendant, while not lacking in force of delivery or conviction, cannot be sustained to defeat the plaintiff's allegation of fraud on a mere point of pleading.

[20] Of course the issue of whether fraud has been proven against the fourth defendant is a matter of evidence, which is addressed in para. 39 *et seq., post.*

Whether The Plaintiff Can Avail Himself Of s. 340 Of The NLC

[21] Counsel for the fourth defendant argued that the plaintiff, because he was never registered as proprietor of the subject property, could not avail himself of s. 340 of the NLC to defeat the title of the fourth defendant.

[22] However, a plain reading of s. 340 does not support his proposition. Section 340(2) is not drafted in the active voice, which is to say that it does not specify the identity of the person who may defeat the title of a registered holder. The plaintiff, having paid the purchase price, became the beneficial owner of the property, with the vendor holding the legal title to the property on a bare trust for the plaintiff. There is nothing in s. 340 of the NLC that proscribes the ability of a beneficial owner to avail himself of the protection of that provision.

[23] That the vendor became a bare trustee is clear from cases such as *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67; [1976] 2 MLJ 53. In the present case, the relevant memorandum of transfer for the property had not been executed in favour of the plaintiff, but in my judgment that does not prevent the bare trust from arising. The true test as to the circumstances which give rise to a bare trust is that set out in *Howard v. Miller* [1915] AC 318, a decision of the judicial committee of the Privy Council on appeal from British Columbia:

> It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.

[24] In the present instance, the plaintiff had paid the full purchase price for the property, and would have been entitled to specific performance against Natarjaya. Natarjaya accordingly held the legal title to the property as trustee for the plaintiff.

[25] Of course, the existence of a bare trust in and of itself is of no consequence to the present case, as this was not a case involving competing equities. The existence of a bare trust should not have the effect of defeating the title of a registered proprietor in a system of title by registration. The only way in which the title of a registered proprietor may be challenged is under the NLC itself.

[26] The proposition that a beneficial owner who was not previously registered as proprietor may avail himself of s. 340 to defeat the title of an existing registered proprietor is supported by the decision in *Ong Chat Pang & Anor (supra)*. The facts in *Ong Chat Pang & Anor* bear similarity to those of the present case.

[27] In *Ong Chat Pang & Anor*, the plaintiff, Valliappa Chettiar, entered into a written agreement with the first and second defendants to purchase a piece of land in Klang on which a house was being constructed. The plaintiff paid half of the purchase price to the vendors. Approximately two months later, the plaintiff received word that the vendors were facing financial difficulties, as a result of which the plaintiff prepared a caveat, which was presented on 24 January 1958. On 30 January, the plaintiff was informed that his caveat had been rejected and that a transfer had been presented and registered that very same day in favour of the third and fourth defendants.

[28] The Federal Court in *Ong Chat Pang & Anor* held that the plaintiff was entitled to rely upon s. 40 of the FMS Land Code to defeat the title of the third and fourth defendants in that case, who were the registered proprietors and who had purchased the property after the plaintiff.

[29] It is important to note that there was no finding of fraud by the trial judge against the third and fourth defendants in *Ong Chat Pang & Anor*. Nonetheless, they bore the burden of proving that they were *bona fide* purchasers for valuable consideration. Their failure to do so meant that their title was defeasible at the instance of Valliappa Chettiar, the plaintiff and appellant. The plaintiff, it will be remembered, was never registered as proprietor.

[30] A preliminary observation may be made that although the wording used in s. 40 of the FMS Land Code was different from that contained in s. 340, the differences in wording do not have any impact on their legal effect: see the *dicta* of Abdul Hamid FJ in *Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1983] 1 MLJ 81:

> We have, for purposes of the present case, examined the wording of section 42(i) and (ii) of the Land Code 1926 and section 340(1) and (2) of the National Land Code and do find that though the words used in both these sections are not the same we are of the view that the meaning they bear, in short their legal effect, cannot be said to be different.

[31] A more serious objection to the plaintiff's case is the criticism of the decision in *Ong Chat Pang & Anor* by Teo Keang Sood and Khaw Lake Tee in their book *Land Law in Malaysia* (3rd edn) at p. 200. This was what they had to say:

> [4.46] As was the position under section 42 of the FMS Land Code (Cap 138), section 340 of the National Land Code 1965 sets out the circumstances under which a title will be rendered defeasible in the hands of a registered proprietor. Section 340 of the Code thus operates to make the title of the registered proprietor *prima facie* indefeasible in the absence of the title being acquired under any of the circumstances specified therein. Accordingly, it is not clear how the title to the land registered in the names of the third and fourth defendants could be set aside or rendered defeasible when none of the vitiating circumstances was present.
>
> [4.47] It would appear that the third and fourth defendants pleaded section 42(iv) of the FMS Land Code (Cap 138) as one of the bases of their good title. Subsection (iv), like section 340(3) of the National Land Code, is, however, only operative where a purchaser is taking from a proprietor whose registration was procured by means of fraud, forgery or any insufficient or void instrument. In such a situation, the title of the purchaser is indefeasible if he has taken the property *bona fide* and for valuable consideration. There being nothing in the case to indicate that the vendor's title was affected by either subsection (ii) or (iii) of section 42, the basis of the third and fourth defendants' claim could only rest on section 42(i) and not subsection (iv) as pleaded.

[32] The gist of the argument is that the third and fourth defendants need not even show that they were *bona fide* purchasers for valuable consideration, as the title of the vendors was not defeasible under any of the predecessor provisions of s. 340(2), and accordingly, the predecessor to s. 340(3) would not apply to the third and fourth defendants.

[33] In my opinion, the learned authors overlooked a critical fact. The plaintiff had pleaded that the transfer in favour of the third and fourth defendants was effected fraudulently. When the suit came to be heard by Abdul Hamid J at first instance, the first and second defendants (being the vendors) never entered appearance. It follows therefore that the plaintiff's claim of fraud, as against the first and second defendants, was proven. Abdul Hamid J had made a finding that the court could not infer fraud on the part of the third and fourth defendants, and there was no appeal by the plaintiff on this finding.

[34] The true analysis of *Ong Chat Pang & Anor* is as follows. The vendors, having received part of the purchase price from the plaintiff, held the legal title to the property on a bare trust for the plaintiff. When they sold or purported to sell the property a second time to the third and fourth defendants, they had done so fraudulently. At this point, their title became defeasible by virtue of s. 340(2)(a). When the property was transferred to the third and fourth

defendants, their title too became defeasible, pursuant to s. 340(3)(a). They then bore the burden of showing that they came within the proviso to s. 340(3) and were *bona fide* purchasers for valuable consideration. Their failure to do so meant that the plaintiff, the erstwhile beneficial owner, was able to defeat their title.

[35] In the present case, the first defendant, being the vendor, never entered appearance. Accordingly and as explained in para. 12 *ante*, the plaintiff's case of fraud as against Natarjaya and its directors the second and third defendants is taken to have been proven.

[36] Having paid the purchase price for the property, the plaintiff became the beneficial owner. The developer held the property as bare trustee for the plaintiff. When Natarjaya entered into an agreement to sell the property a second time to the fourth defendant, it committed a fraud and its title became defeasible on account of such fraud. (Up until then, Natarjaya's title was indefeasible, pursuant to s. 340(1)). It does not matter that no conveyance had yet taken place, as s. 340(2)(a) (unlike sub-para. (b) of that subsection) places no requirement that there must be a registration for the characterisation of the title of the proprietor to change.

[37] When the property was transferred to the fourth defendant, her title was defeasible by virtue of s. 340(3)(a), due to the vitiating circumstance of the fraud by Natarjaya and its directors. It then became incumbent on the fourth defendant to show that it was a purchaser in good faith and for valuable consideration. This is considered at para. 48 below. Of course, if it is determined that the fourth defendant was, in purchasing the property, complicit in the fraud committed by the first to third defendants, then her title would be defeasible pursuant to s. 340(2)(a). The claim of fraud against the fourth defendant is addressed at para. 39 *et seq*.

[38] Counsel for the plaintiff cited other cases where a person other than a previously registered proprietor was able to rely on s. 340 to defeat the title of a registered proprietor. It will only be necessary to mention one of them, being the case of *Samuel Naik Siang Ting & Ors v. Public Bank Bhd*, where it was held by the Court of Appeal that an equitable mortgagee could avail itself of s. 340(2) to defeat the transfer of the subject properties to the defendants.

The Case Of Fraud Against The Fourth Defendant

[39] The starting position in analysing land disputes and the application of s. 340 of the NLC should be the direction to trial judges given in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*:

> Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered

A in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* B subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

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[40] This passage seems to suggest that it is not necessary to consider whether the fourth defendant is complicit in the fraud on the basis that the title of an immediate purchaser is always defeasible by virtue of s. 340(2); however, in my respectful view the *dicta* in that case goes further than was D necessary to determine the issues in that case and should not apply where fraud is alleged but has not been proven against an immediate purchaser. Whether or not the title of the immediate purchaser is defeasible is dependent on the following:

(a) if the immediate purchaser was a party or privy to a fraud, then his title E is defeasible under s. 340(2)(a);

(b) if the immediate purchaser was not complicit in the fraud, s. 340(2)(a) does not operate to render the title defeasible in the hands of the immediate purchaser. Where the fraud was perpetrated by the vendor and prior registered proprietor, the title of the vendor becomes F defeasible in the hands of the vendor, at the point in time the fraud was committed. Once the immediate purchaser becomes registered, then his title is defeasible under s. 340(3)(a), on the basis that he is a transferee subsequent to the vendor, in relation to whose title the vitiating circumstance of fraud existed. It therefore follows that an immediate G purchaser in this instance (ie, one who was not implicated in the fraud) can obtain an indefeasible title if he can show that he was a purchaser in good faith for valuable consideration. This was the position in the Federal Court decision of *Ong Chat Pang & Anor*;

(c) if the immediate purchaser obtained title through registration that was H tainted by a forgery, or an insufficient or void instrument, then his title is defeasible under s. 340(2)(b), regardless of his culpability. It is not even open to him to show that he was a purchaser in good faith for valuable consideration, in order to obtain indefeasible title. Of course, his title is nonetheless a good title, until challenged; and

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(d) if the title of the immediate purchaser was unlawfully acquired in the purported exercise of any power of authority conferred by any written law, then the title of the immediate purchaser would be defeasible under s. 340(2)(c). Again, it will not be open to the immediate purchaser to show that he was *bona fide* in the event of any challenge to his title.

[41] I now turn to the allegation of fraud against the fourth defendant.

[42] Although the plaintiff's statement of claim and his testimony in court alleged fraud against the fourth defendant, there was no independent evidence or objective fact in this case that could be said to support the allegation of fraud, except perhaps the fact that the purchase price was only RM45,000 (when the initial purchase price paid by the plaintiff more than 20 years previously was RM57,540 and the subsequent sale to the fifth defendant was for RM95,000). I find that this in itself is insufficient to discharge the burden of proof.

[43] A note on the standard of proof for fraud in civil cases: the recent Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 now establishes that the standard of proof is on a balance of probabilities.

[44] Counsel for the plaintiff relied on the fact that the fourth defendant has not testified in court, and so has not tendered any evidence to counter the allegations of the plaintiff. He argued that, based on *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, this court will necessarily have to accept the testimony of the plaintiff. Counsel for the plaintiff also invited this court to draw an adverse inference against the non-appearance of the fourth defendant to testify in court and her decision to elect for evidence to be adduced through DW2 on the basis of a power of attorney.

[45] It is instructive to consider the relevant passages of the judgment of Gopal Sri Ram FCJ in *Takako Sakao*:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 at p 128:
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> > **If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case,** then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.
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> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first

defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155. See also, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: "The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it". There are two other authorities that are of assistance on the point. In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority I derive the following principles in the context of the present case:
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> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) *There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

[6] *Sarkar on Evidence* 16th edn at p. 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v. Gurdial, A* [1927] PC 230.
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> (emphasis added)

[46] In my judgment, the decision in *Takako Sakao* can be distinguished for the following reasons:

(a) a court must accept the unrebutted testimony of the party bearing the evidential burden of a fact in issue only in circumstances where that party "gives or calls evidence which, if it is believed, is sufficient to prove his case" (per Elphinstone CJ in *Wasakah Singh*, emphasised in the passages quoted *ante*). The evidence of the plaintiff in the present case amounted to nothing more than a bare allegation of fraud, which together with the circumstantial evidence of the amount of the purchase price paid, are not in my view capable of discharging the burden of showing that, on a balance of probabilities, the fourth defendant was guilty of fraud; and

(b) similarly, the passage from the judgment of Brooke LJ in *Wisniewski v. Central Manchester Health Authority* suggests that there must be some evidence adduced by the party bearing the evidential burden of a fact in issue and that there must be a case to answer on the issue before a court

may be entitled to draw an adverse inference on the non-appearance by the other party. In the present case, I am of the view that the plaintiff's bare allegation of fraud does not amount to evidence that would call for the plaintiff's case of fraud to be answered by the fourth defendant.

[47] I accordingly find that the plaintiff has failed to prove that the fourth defendant was a party or privy to the fraud committed by the first to third defendants. As a consequence, the fourth defendant's title is not defeasible by reason of s. 340(2)(a) of the NLC, but it now becomes incumbent on the fourth defendant to show that she was a purchaser in good faith and for valuable consideration in order to obtain indefeasible title pursuant to the proviso to s. 340(3). This is considered in the following paragraphs.

Bona Fide Purchaser For Value

[48] The burden of proof lies on the fourth defendant as purchaser to show that it is a purchaser in good faith and for valuable consideration (see *Ong Chat Pang & Anor*'s case). The fourth defendant had not testified in court personally, but had given a power to attorney to DW2, through whom documentary evidence was tendered.

[49] The applicable test to determine good faith is summarised with characteristic perspicuousness in the judgment of Harmindar J in *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107. I can do no better than to reproduce the relevant passages here:

> [22] Now who is a good faith purchaser or sometimes known as a *bona fide* purchaser has been considered in a number of cases. In *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167 the Court of Appeal held that the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction but the overriding consideration is the particular circumstances of each case (per Richard Malanjum JCA (as he then was) at p. 184).
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> [23] In another Court of Appeal decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, Raus Shariff JCA (as he then was) in a separate but supporting judgment held that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. His Lordship took the view that a subsequent purchaser was "under an obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the vendor as correct and genuine". When the purchaser "failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court". (at p. 554)
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> [24] It may therefore be surmised that in order to prove there was a *bona fide* purchase what is required of the purchaser is to establish that there was an honest dealing or honest conduct in the acquisition of any title or interest in any property (see also *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224). In this regard, there is a duty

> to make the necessary enquiries regarding the dealing as the particular circumstances of the case demands so as to acquire knowledge of any improper conduct. Any person who in the circumstances ought to have made the necessary inquiries but fails to do so may be guilty of wilful blindness or voluntary ignorance such that it would amount to unfair conduct. Even carelessness or negligence in doing so would disentitle the subsequent purchaser to the title or interest of any such property. It cannot be gainsaid that the duty to do so cannot be a light one as otherwise gross injustice would befall the innocent owner of the land.

[50] For a purchaser to discharge the burden of showing that he is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that he had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. A reasonably prudent purchaser in this context means a person with the knowledge, attributes and circumstances of the particular purchaser in question.

[51] Counsel for the fourth defendant argued that the fourth defendant has successfully discharged her burden of proving that she was a purchaser in good faith for valuable consideration. Although she did not attend court personally to testify, she did authorise DW2 to attend court on her behalf. Counsel for the fourth defendant posited that following two documents tendered through DW2 was sufficient to establish that the fourth defendant was a *bona fide* purchaser for valuable consideration:

(a) the confirmation from Natarjaya dated 10 September 2008 that, *inter alia*, it was the registered proprietor of the property in question and that there was no encumbrance over the property; and

(b) the copy of the strata title showing that Natarjaya was the registered proprietor of the apartment in question.

[52] Counsel for the plaintiff argued that these two documents showed that the fourth defendant had no notice of the prior interest of the plaintiff and that therefore she was a purchaser in good faith and for valuable consideration within the meaning of the proviso of s. 340(3), with the attendant effect that she acquired indefeasible title. I am willing to accept the proposition that the absence of personal testimony will not necessarily be fatal to the fourth defendant's case that she was a *bona fide* purchaser, and that it may be possible for documentary evidence to be used to establish *bona fides*. However, the evidence will have to be assessed as a whole in determining this particular question of fact.

[53] Against this evidence is the fact that the purchase price paid by the fourth defendant was only RM45,000, which is lower than the price that the plaintiff paid for the property some 20 years previously, and less than half of the selling price to the fifth defendant five years later. As the fourth

defendant did not testify in person, there was no explanation as to why the purchase price paid by the fourth defendant was lower than the original purchase price paid by the plaintiff and much lower than the subsequent sale price to the fifth defendant. The fourth defendant could have tendered evidence to show that the market price for the apartment unit at the material time was reflective of the purchase price paid. As explained by Harmindar J in the *Overseas Realty* case, the duty on a purchaser is not light one. If the purchase price was lower than the market price at the material time, a reasonably prudent purchaser would have been placed on a duty to make further inquiries.

[54] In addition, the plaintiff tendered evidence to show that he had continued to pay assessment on the property to Dewan Bandaraya Kuala Lumpur right up until 2015. No evidence was offered by the fourth defendant to show that she too was paying assessment. In my view, a proprietor would be put on inquiry if no assessment notice was received from the local authority.

[55] Of course, the purchase price paid by the fourth defendant and the unexplained payment of assessment by the plaintiff do not of themselves prove that the fourth defendant was not *bona fide*. However, that is not the inquiry here. The evidentiary burden lies on the fourth defendant to show that she was a *bona fide* purchaser. In my judgment, the two documents referred to by counsel for the fourth defendant do not, in the light of the contrary evidence and in the absence of her personal testimony, establish that she was a purchaser in good faith and for valuable consideration.

The Plaintiff's Claim Against The Fifth Defendant

[56] The fifth defendant was never registered as proprietor of the subject property, and therefore no issue arises as to his title. At trial, there was no evidence adduced to establish any fraud on the part of the fifth defendant. As such, the plaintiff's claim against the fifth defendant is dismissed.

[57] For the reasons set out above, I allow the plaintiff's claim against the first to fourth defendants on the terms set out in para. 15 *ante*.